No. 48576-1-II

#15-1-03793-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GREGORY LAMONT HUGHES SIMMONS, JR.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Kathryn J. Nelson, Trial Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove that the theft of a motor vehicle was a "domestic violence" incident and the overbroad use of the "domestic violence" allegation here allowed improper "propensity" evidence and argument to be used against appellant Gregory Hughes Simmons, Jr., at trial.

2. The prosecutor committed serious, flagrant, prejudicial and ill-intentioned misconduct.

3. The sentencing court acted without statutory authority in ordering a condition of sentence which provided, "Forfeit all items in property." CP 72. This Court's decision in State v. Roberts, 185 Wn. App. 94, 339 P.3d 995 (2014), controls.

4. Appellant assigns error to the pre-printed finding 2.5 on the judgment and sentence which provided as follows:

> **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 61.

5. The lower court erred in failing to follow the mandates of State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), as made clear by City of Richland v. Wakefield, __ Wn.2d __, 380 P.3d 459 (2016), and further did not comply with the requirements of RCW 10.01.160 in ordering legal financial obligations.

6. The Court should not follow Division One in State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016), because Sinclair appears to create a presumption of imposition of costs on appeal against an indigent person who has exercised his constitutional right to appeal and thus runs afoul of state and federal constitutional limits on imposition of costs for exercise of a constitutional right, under State v. Blank, 131

Wn.2d 230, 930 P.2d 1213 (1997), and Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

7. The Court should decline to impose costs on appeal against appellant who was found indigent for trial and appeal where there has been no evidence presented to rebut the presumption of indigence.

B. ISSUES PRESENTED

1. Appellant was accused of stealing his ex-girlfriend's car months after they had broken up. The prosecution charged the case as a "domestic violence" incident and, as a result, was allowed to admit highly prejudicial "propensity" evidence from the ex-girlfriend that appellant had beaten her, hit her, stolen her car and otherwise harassed her.

   Was there insufficient evidence to prove the incident involved "domestic violence" as that term is meant?

   Is applying a "domestic violence" allegation against a defendant in a case such as this problematic because it allows trial by "propensity" or based on emotion?

   Further, did the prosecutor commit misconduct in exploiting that "propensity" argument in closing?

2. In Roberts, this Court specifically rejected a general order of forfeiture entered as a condition of sentencing, noting that RCW 9.92.110 eliminated the doctrine of "forfeiture by conviction" and a sentencing court has no inherent "forfeiture" authority. Did the sentencing court err and act outside its statutory authority in this case in ordering a similar forfeiture?

3. In Blazina and Wakefield, the Supreme Court held that RCW 10.01.160 is not satisfied by a preprinted finding of "ability to pay" but requires a specific analysis and detailed examination and consideration of the defendant's actual financial situation. Did the sentencing court err in failing to follow those requirements and is reversal and remand for resentencing required?

4. Should the Court decline to follow Sinclair, supra, because it appears to create a presumption that the court will impose costs against an indigent for exercising his constitutional right to appeal unless he disproves it, thus running afoul of state and federal prohibitions against imposing such costs?

5. Should the Court decline to impose costs on appeal against a person who has exercised his constitutional right to appeal but who was found indigent for trial and appeal and there has been no evidence to rebut the presumption of indigence?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Gregory Lamont Hughes Simmons, Jr., was charged by information in Pierce County on September 22, 2015, with theft of a motor vehicle, alleged to have been a "domestic violence incident as defined in RCW 10.99.020(a)." CP 3-4; RCW 9A.56.020(1)(a); RCW 9A.56.065; RCW 10.99.020(a). After a hearing in front of the Honorable Judge Stanley J. Rumbaugh on January 14, 2016, pretrial matters and a jury trial were held before the Honorable Judge Kathryn J. Nelson on January 26-28, 2016. RP 1, 17, 133. The jury convicted as charged. CP 33-34.

On February 2, 2016, Judge Nelson imposed a standard-range sentence of 29 months. CP 57-62; RP 251-62. Hughes Simmons, Jr., appealed and this pleading follows. See CP 73.

2. Testimony at trial

Lauren Lozada was in a "dating relationship" with Greg Hughes Simmons, Jr., at some point in 2014 and 2015. RP 44-45. Lozada, who had lived in Tacoma for about 20 years, knew Hughes Simmons, Jr.'s, family, and that was how they had met. RP 44-45.

The relationship did not last, however. RP 45-46. At a later trial where Lozada would accuse Hughes Simmons, Jr., of stealing her car, she could not seem to decide how long. RP 44-45. First, she said they dated a few months, then, "like five- around five, six" months. RP 45. When

asked to describe the actual dates, she decided it had lasted from sometime in the beginning of 2014 to about Valentine's Day in February the following year - which would mean a year. RP 45. But then she repeated her description of only five or six months. RP 45. Still later she would say it started "early, middle" of 2014 and ended in February of 2015. RP 84.

Lozada testified that they broke up because he was seeing other people and she did not want to be in an "open" relationship. RP 45-46.

The car Hughes Simmons, Jr., was accused of taking was a 1986 Chevrolet "Caprice" which was sitting in the driveway of Lozada's mom's home at the time RP 46-48. Lozada had only owned the car for about a month or so when they dated. RP 106-107. When asked to be "more specific," she responded "[t]hree," and then, "[t]hree, four, five" months. RP 106.

According to Lozada, in the short time she had the car while they dated, he would drive, take her keys and drop her off at her house, which would cause arguments with her parents because it was her car, not his. RP 105. Indeed, she said, he was "possessive" of her car. RP 105-106. They argued about it and she said he drove the car without her permission a few times. RP 106. Lozada also said that Hughes Simmons, Jr., would take the car and have a key made and she would have to change the key or replace it. RP 107. She had to do so "about six times, or no, like, three, four, five times" in the two months she had a car which she and Hughes Simmons, Jr., were involved. RP 107.

Lozada testified about following Hughes Simmons, Jr., once when

he had her car. RP 104. When he stopped at the casino and went in, she then called her mom and the towing company. RP 108. She was not sure if she had called the police about it. RP 108-109. He was not arrested for that incident. RP 109.

It appeared this incident was in "[l]ike March, April" of 2015, and also involved him putting a security system on the car, which she had to get reprogrammed to use later. RP 48-50.

Lozada had her own legal troubles, having recently been convicted of a theft at the time of the 2015 trial. RP 80. In July of 2015, she had been "at court" when someone had told her Hughes Simmons, Jr., was at her car outside. RP 51-52. She left the proceedings, anxious to check if he was breaking in. RP 52. In the parking lot she saw him "sitting on my hood," his girlfriend's car parked next to hers. RP 52.

Lozada called the police but they were unconvinced she needed help. RP 53. As she said, "they thought it was just a[n] interruption of something." RP 53. Whatever the reason, they were not going to help the way she wanted. RP 53.

Lozada marched over and told Hughes Simmons, Jr., that she had "court right now" and he needed to "go and leave" her car alone. RP 53. According to Lozada, Hughes Simmons, Jr., said, "that's not happening," so Lozada just walked into the middle of the intersection of the nearby street. RP 53. Hughes Simmons, Jr., followed and, Lozada said, she then had to start "pushing him off," because he tried to talk to her about giving him the keys and their relationship. RP 53.

Lozada took the dispute into a nearby business expecting to get

some help. RP 53. Inside, in the back of the café she had entered, she claimed he held her down, would not let her "get out" and took her key chain and key ring. RP 54.

After that, Lozada said, Hughes Simmons, Jr., tried to talk to her, but she did not want to talk or try to "fix" their problems. RP 54. She noted, "his girlfriend was waiting for him outside with his daughter." RP 54.

Lozada described herself as "just trying to get away from him." RP 54. She said that giving him a ride in her car appeared to be the "only way." RP 54. She did not explain why he could not get a ride from the girlfriend in the car outside despite mentioning that girlfriend's car being there. See RP 54. By giving him a ride, Lozada admitted, a warrant was going to be issued for her not coming back to court and her court date was going to be rescheduled. RP 54-55.

When she dropped him off, Hughes Simmons, Jr., had given Lozada her all of her keys back, keeping only a "remote" for the car. RP 55.

Several weeks later, on August 12, Lozada's car was stolen from the driveway of her mom's home. RP 55-56. A neighbor, Renee Brooks, was home and saw the car taken. RP 140-42. She was shown a montage including Hughes Simmons, Jr., made by Tacoma Police Department Detective David Lucky. RP 140-42, 182. Brooks thought two men looked like the man she had seen but ultimately identified a picture of Hughes Simmons, Jr., as the person who had taken the car. RP 140-42, 182.

A few days later, Lozada searched for and found what she thought

were her items on an online sales site called "OfferUp," where people post pictures of items for sale and "deals" are made. RP 57-58. Lozada said she had installed 22-inch "Boss" rims on her car and also had put a stereo system in and someone was selling similar items on that site. RP 59. Lozada was convinced the profile was for Hughes Simmons, Jr., and said he had used that profile to sell items when they had dated. RP 61-62, 69-70. The phone number listed on the profile was familiar to her too, she said, because it was the number she had called to reach Hughes Simmons, Jr., at the same time. RP 66.

At trial, Lozada identified a "screenshot" she said she took of a conversation with a person purporting to be "Monty," the owner of the profile in question. RP 66-67. That communication indicated a phone number to call that she associated with Hughes Simmons, Jr. RP 66-67.

Lozada was herself communicating under a false profile online. RP 67-68. She set up several because she thought if he knew it was her inquiring, he would take everything "down." RP 67-68, 71-72, 111.

She admitted, however, that people could set up a profile for someone else and she would herself have most of the information needed to set one up for Hughes Simmons, Jr., on "OfferUp." RP 105.

Lozada also testified that, about a month after the car was stolen, she saw Hughes Simmons, Jr., sitting in the passenger seat of a "Crown Victoria" car across an intersection from her, and thought that car had on her wheels. RP 77. Lozada said the passenger and driver turned as they passed by her car which made her think it was them, so she got on the phone with police and started following. RP 77. Lozada got her car back

when it was recovered on September 21st. RP 74. Tacoma Police Department officer Joseph A. Bundy responded to Lozada's 9-1-1 call, and somehow Lozada, the officer and Hughes Simmons, Jr., talked about what was going on for awhile. RP 158. The officer said Mr. Hughes Simmons, Jr., seemed "in a relaxed state" but Ms. Lozada was not. RP 158-59. After some time, Detective Lucky called Bundy and told Bundy there was "probable cause" to arrest Hughes Simmons, Jr., so Bundy did. RP 160-61.

Lozada's car was "[t]otalled" when it was recovered. RP 75, 111.

The issue of the nature of the relationship was made a part of the case by the state. On redirect, the prosecutor asked if Hughes Simmons, Jr, had ever "been violent" with Lozada, eliciting, "[h]it me, beat me up, choked me." RP 112. Counsel objected on the grounds it was uncharged crimes, prejudicial and irrelevant, but the prosecutor then stated to the contrary, "especially in a domestic violence relationship." RP 113. The prosecutor went on to elicit from Lozada that Hughes Simmons, Jr., had cracked her ribs. RP 113.

On cross-examination, when asked if she continued to see Hughes Simmons, Jr., after the relationship ended, Lozada described him making "appearances" in her life and said he would make it "a hassle" to get away. RP 84. Lozada maintained she did not take any long trips with him after they broke up. RP 84. She then said he had stolen her car yet another time when he found out she was going to Las Vegas because of her facebook postings and wanted to go with her. RP 85, 114. Lozada said she was at her best friend's house that time and Hughes Simmons, Jr., was outside

breaking into her car. RP 85. Lozada testified that she went outside and he grabbed her and threw her in the car, saying she was not going to Las Vegas by herself and he was going to pick up his cousin to come with them to make sure she was not going to try to run away. RP 85-86. After that, she said, he took her to her grandmother's house, parked outside and had her go in to get her stuff. RP 85.

When asked why she allowed him to invite himself along, Lozada responded, "I didn't allow him because he had beaten me up when he seen me." RP 85-86. She said she was not going to argue when "he was physically doing damage to me," but when asked whether she was kidnaped she hedged, saying, "[i]n a way." RP 86. She did not report it to police at that time or ask any of the people she ran into at their various stops on the way to help. RP 86-93. She explained at trial that she had all her stuff in the car and was planning to just leave when they got to Vegas because her uncle was there. RP 94.

Ultimately, Lozada admitted, she could have driven the car away by herself but she did not. RP 94. She also did not report it, saying at trial that was because she was afraid of retaliation and the police "to not be able to do something and him know that I was reporting him as trying to kidnap me so her could hurt me further." RP 97.

She did not explain why she then had no similar concerns, however, when calling police to report him for stealing her car. RP 97.

D. ARGUMENT

1. THE CRIME DID NOT INVOLVE "DOMESTIC VIOLENCE" AND THE ADDITION OF THAT CHARGE ALLOWED IMPROPER, HIGHLY PREJUDICIAL "PROPENSITY" EVIDENCE TO BE ADMITTED, WHICH THE PROSECUTION THEN EXPLOITED

Mr. Hughes Simmons, Jr., was accused of Theft of a Motor Vehicle, which requires proof that someone has committed "theft," a Class B felony. CP 3-4. That crime is defined as "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). But in addition, the prosecution alleged that the theft was a "domestic violence incident." CP 3-4. It is that allegation which led to the improper result below.

Under RCW 10.99.020(3), a domestic violent incident is an incident committed by one person against a "family or household member." A person meets that definition if they are 16 or older and they have had a "dating relationship" at any point in time. RCW 10.99.020(3).

The consequences of a "domestic violence" allegation have changed over time. When first enacted, the Domestic Violence Act, Chapter 10.99 RCW, was not intended to establish new crimes but instead simply to "emphasize[] the need to enforce existing criminal statutes in an evenhanded manner to protect the victim regardless of whether the victim was involved in a relationship with the aggressor." Roy v. City of Everett, 118 Wn.2d 352, 358, 823 P.2d 1084 (1992); see RCW 10.99.010.

Now, however, a claim of "domestic violence" involves more. A "domestic violence" finding for a felony increases the defendant's

potential offender score by including additional crimes. See RCW 9.94A.525(21). Such a finding can also support an aggravated sentence above the standard range if other facts are also shown. See RCW 9.94A.390(2)(h). It supports imposition of certain conditions of community custody.

But more crucial here, prosecutors who include a "domestic violence" allegation along with the charged crime are given far more latitude and ability to introduce extremely prejudicial evidence in their case sometimes. See State v. Ashley, 186 Wn.2d 32, 375 P.3d 673 (2016). Under ER 404(b),

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Normally, that rule "absolutely prohibits" the use of so-called "propensity" evidence - evidence that the defendant is more likely to be guilty of the charged crime based not on what the state can prove he did but rather who he *is* - a "robber" who did it before so probably did it again, for example. See, e.g., State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

All ER 404(b) evidence is of course prejudicial, but "propensity" evidence is extremely so. See State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984). As the U.S. Supreme Court has declared, such evidence is not admissible even though "logically" it is persuasive about the defendant being the perpetrator of the crime, because it is "said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defendant against a

particular charge." Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

"Domestic violence" evidence is especially prejudicial. See State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014). In fact, our Supreme Court has noted, "the risk of unfair prejudice is very high" when such evidence is admitted. Id.

By attaching a "domestic violence" designation to this case, the prosecution effectively then swung open the door to evidence of uncharged alleged acts and used it to improperly gain a conviction. Normally, when evidence is being admitted for a permitted purpose under ER 404(b), the proponent must first 1) establish by a preponderance of the evidence that the misconduct occurred and 2) identify the purpose for which it is sought to be introduced, and the trial court must further 3) determine whether the evidence is relevant to prove an element of the charged crime and 4) balance the probative value of the evidence against the unfair prejudice it will engender at trial. See Gunderson, 181 Wn.2d at 925.

But here, the prosecution continued to use the alleged acts of prior misconduct to prove current guilt effectively based on propensity. Throughout trial, the prosecutor elicited testimony about the alleged misconduct. The prosecutor asked Lozada if Hughes Simmons, Jr, had ever "been violent" with her and what had he done, eliciting, "[h]it me, beat me up, choked me." RP 112. When counsel objected on the grounds it was uncharged crimes, prejudicial and irrelevant, the prosecutor then stated to the contrary, "especially in a domestic violence relationship." RP 113. The prosecutor went on to elicit from Lozada that Hughes Simmons, Jr., had

cracked her ribs. RP 113. The entire discussion of the Las Vegas incident appeared designed to ensure that he was portrayed in a dangerous light; she described him making "appearances" in her life and said he would make it "a hassle" to get away from him; said he had effectively kidnaped her for the Las Vegas trip, talked about him stealing her car and beating and hurting her, and other allegations. RP 82-86, 93-94. She even talked about her fear during the alleged "kidnaping" and how she did not report it because she was so afraid of retaliation and the police "to not be able to do something and him know that I was reporting him as trying to kidnap me so her could hurt me further." RP 97.

In Gunderson, the Court cautioned lower courts to guard against the heightened risk of severe unfair prejudice in admitting evidence of prior incidents of "domestic violence" and required them to "confine the admissibility of prior acts of domestic violence in cases where the State has established their overriding probative value." 181 Wn.2d at 925. The Court rejected the prosecution's effort to create a "blanket" exception for prior bad acts when there is "domestic violence" involved. And it further rejected the idea that the witness' history of domestic violence was relevant to "credibility" in every case. Id. Put plainly, the Court said, "[t]hat other evidence from a different source contradicted" the victim's testimony did not "by itself, make the history of domestic violence especially probative of the witness's credibility." Id.

The Court reaffirmed this ruling in Ashley, noting that, regardless of the defendant's claim that the witness was making up the accusations, the trial court had erred in introducing "domestic violence evidence" to

defend her credibility. Id. 186 Wn.2d at 47-48. Because the evidence was already admitted for a proper purpose of proving lack of consent, however, and because of other factors, the Court found the admission of the evidence "harmless." Id.

Here, the "domestic violence" evidence affected the entire tenor of the case. Throughout the trial, Lozada was allowed to testify about alleged domestic violence incidents never charged nor proven in a court even though that evidence was irrelevant and highly prejudicial. And further, the investigating officer testified about being in the "domestic violence unit." RP 139. He said his role was to investigate crimes "related to domestic relationships." RP 139. And he said that, for this case, "the subject listed appeared to be in a domestic relationship" with the victim. RP 139.

Counsel attempted to address the "domestic violence" allegation below. After the state rested, he argued that the allegation should be dismissed. RP 197. He said that, under RCW 10.99.020(5), there had to be some evidence there was actual domestic violence involved, and the last alleged such incident was a month before. RP 199. He pointed out that Lozada was "not even around" at the time of the theft. RP 199. He also argued that the word "domestic violence" should have some meaning other than a past relationship and a current crime. RP 200. He concluded that the prosecutor put on evidence of theft and then talked about an uncharged incident in July to claim "domestic violence" in August. RP 200. He explained the scope of the state's argument that any prior relationship and future crime "you can just call that domestic violence, even if nothing at the time of the crime was a domestic violence situation." RP 208-209. And he

objected later when the jury was given a special verdict form asking only if the victim and defendant were "family or household members" under the statutory definition, which did not require a finding "about domestic violence." RP 213.

But the court denied the motion, and, in closing argument, the prosecutor relied on the claims from Lozada that "this isn't the first time" that Hughes Simmons, Jr., had taken her car. RP 219. "[T]ime and again," the prosecutor said, "he would steal her key and time and again she would change the ignition lock on that car." RP 219. The prosecutor also speculated that he "could have used a jiggler," but did not have the keys so it was not a "borrowing scenario." RP 222.

Later, in rebuttal closing argument, after counsel disputed whether this was a "domestic violence" incident, the prosecutor invoked the "domestic violence" evidence to explain away inconsistencies in the state's case:

> You know, it's interesting in a domestic violence case that, yeah, a victim of domestic violence might act in a way that, at first blush, doesn't seem very rational, right? After being in a relationship that didn't go so well, after her boyfriend, the defendant, **broke her ribs, punched her, attacked her, regularly came to her home, threatened to come to her grandmother's home,** after one day he shows up at her house, finding out she has a plan to go out of town, saying you can't go out of the town on your own. Doesn't matter that our relationship ended months ago. **I'm going to physically assault you, force you into the car.**

RP 235 (emphasis added). The prosecutor also told the jury that it was "not reasonable" to doubt that he did not have permission to take the car. RP 237. A few moments later, the prosecutor declared that Ms. Lozada had showed no bias or prejudice, "[c]ontrary to what" defense counsel said,

because "**being afraid of someone who has broken your ribs and who forces himself into a trip you were otherwise going to take, that's not a credibility issue. That's fear. That is not prejudice or bias.**" RP 239 (emphasis added).

A prosecutor is a quasi-judicial officer who must act impartially and in the interests of justice. See State v. Johnson, Jr., 158 Wn. App. 677, 243 P.3d 936 (2010). Further, the prosecutor has a duty to see that the accused receives a fair trial and must pursue a verdict "free of prejudice and based on reason." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). It is misconduct for the prosecutor to misstate the relevant law to the jury, as the prosecutor here did in describing the victim's "fear." See e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

By charging the "domestic violence" factor here, the prosecutor ensured that some ER 404(b) evidence regarding that claim would come forward. But all that needed to be proved was that the crime involved people who met the definition of "family members," i.e., had dated at some time in the past. The wholesale admission of uncharged, unproven allegations of physical violence from Lozada and the alleged prior thefts of the car could have only convinced the jury to convict regardless whether it believed that the state had proven guilt for this incident beyond a reasonable doubt.

Neither the state nor the federal due process clauses guarantee a "perfect trial." See State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

But they provide for a minimum norm of basic fairness. Id. Such fairness does not occur where evidence is admitted which causes the jury to decide the case based not on the evidence at trial but rather on the emotional strings pulled by the prosecution about the victim and the defendant's "propensity." Miles, 73 Wn.2d at 70; see Kelly, 102 Wn.2d at 199-200. The trial court erred in allowing admission of the scope of evidence of "domestic violence" at trial, and Mr. Hughes Simmons, Jr., did not receive a fair trial as a result. The misconduct exploited that error and further compels reversal. This Court should so hold.

2. THE TRIAL COURT ACTED WITHOUT STATUTORY AUTHORITY IN ORDERING FORFEITURE AS A CONDITION OF SENTENCE

This Court should also strike the order of forfeiture written on the judgment and sentence, because a sentencing court has no inherent authority to order forfeiture, there was no statute supporting the order and the order was in violation of RCW 9.92.110, which abolished the doctrine of allowing forfeiture based on a defendant's conviction of any crime.

In general, a sentencing court's authority to impose conditions of a sentence is limited by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Under the Sentencing Reform Act, the Legislature alone has the authority to establish the scope of legal punishment and sets the limits by statute. See State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999).

The authority to order forfeiture is wholly statutory. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857,

865, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998). In addition, "[f]orfeitures are not favored." City of Walla Walla v. $401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011).

As a result, a trial court has no authority to order forfeiture unless there is a specific statute authorizing that order. State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992). Importantly, this is true even when a defendant is accused of a crime. As this Court has noted, there is no "inherent authority to order the forfeiture of property used in the commission of a crime." Alaway, 64 Wn. App. at 800-801. It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. Id.; see Espinoza, 87 Wn. App. at 866.

At sentencing here, the prosecutor mentioned forfeiture as one of the conditions it was requesting in general:

> The State is asking for 29 months in custody with credit for time served. There is no community custody for a theft of a motor vehicle count. $500 Crime Victim Penalty Assessment, $200 costs, $100 DNA fee, $500 that - excuse me, $1,500 DAC recoupment since this did go to trial, restitution per later order of the Court, no contact with Lauren Lozada, domestic violence evaluation and followup treatment, forfeit any items in property, and law-abiding behavior.

RP 254. In ordering the sentence, the trial court did not mention any forfeiture condition. RP 258-59. Written on an appendix added to the judgment and sentence document, however, was a condition, "forfeit items in property." CP 72.

Thus, here, the court authorized government forfeiture of property but did not cite any legal authority for such an exertion of power. CP 72.

The unsupported order must be stricken. Roberts, supra, is on point. In Roberts, also a case from Pierce County and this Court, the sentencing court wrote on the judgment and sentence, "[f]orfeit any items seized by law enforcement," as a condition of sentencing. 185 Wn. App. at 96. This Court rejected the prosecution's efforts to argue that there was any authority for such an order of forfeiture simply based on the conviction. 185 Wn. App. at 95-96. Instead, the Court held, there was no statutory or inherent authority authorizing government forfeiture of items as a condition of sentencing. 185 Wn. App. at 95-96.

Further, the Court rejected the idea that a defendant must somehow make a motion for the return of property or meet some other burden in order to challenge the unlawful condition of sentencing authorizing immediate forfeiture of property. 185 Wn. App. at 96. In Roberts, the prosecution claimed that, to be allowed to challenge this condition of his sentence, Roberts had to make certain motions below. 185 Wn. App. at 96.

More specifically, the prosecution claimed that the defendant had to move for return of property under CrR 2.3(e) below. 185 Wn. App. at 96. This Court rejected that novel theory, noting, "CrR 2.3(e) does not provide any statutory authority for forfeiture of seized property," so it could not be the basis for the trial court's order below. Id. Indeed, the Court noted, "even if CrR 2.3(e) somehow authorized forfeiture, that rule applies only to property seized in an *unlawful* search," not property in general. Id (emphasis in original).

A defendant is not automatically divested of his property interests in even items used to create contraband, simply by means of conviction.

Alaway, 64 Wn. App. at 799. Instead, "the State cannot confiscate" a citizen's property "merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures." Id.

Notably, the Legislature has carefully crafted such procedures to include protections against governmental abuse of the awesome authority of taking away the property of a citizen. See, e.g., RCW 10.105.010 (law enforcement may seize certain items to forfeit but must serve notice and offer a hearing, etc.); RCW 69.50.505 (controlled substance forfeitures requiring notice, an opportunity to heard, a right of removal, a civil proceeding etc.); Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Further, many forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, **in separate civil proceedings**, that property should be forfeited as a result of its relation to a crime. See RCW 9A.83.030 (money laundering; attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, etc.); RCW 9.46.231 (gambling laws: 15 days notice, etc.). And CrR 2.3(e) governs property seized with a warrant supported by probable cause and issued by a judge which requires serving the person when the item is seized with a written inventory and information on how to get their property back if they believe their property

was improperly seized under the warrant. But that rule is limited to items deemed "(1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed[.]"

None of these statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant in this fashion. Nor do the statutes authorize such a forfeiture without any of the process which is constitutionally due before the government may seize the property of a man or at least the process the Legislature required before such forfeitures may occur. See, e.g., Alaway, 64 Wn. App. at 798 (rejecting the idea that the sentencing court had "inherent power to order how property used in criminal activity should be disposed of").

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. And indeed, to the extent that the trial court assumed it had authority to order the forfeiture based upon the criminal conviction, that assumption runs directly afoul of RCW 9.92.110, which specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." Thus, under the statute, the mere fact that the defendant was convicted of a crime is not sufficient on its own to support an order of forfeiture. This Court should follow Roberts and so hold.

3. THE SENTENCING COURT ERRED IN FAILING TO CONSIDER ACTUAL ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS AND COUNSEL WAS AGAIN INEFFECTIVE

This Court should also reverse and remand for resentencing under Blazina and its progeny, because the sentencing court failed to follow the requirements of RCW 10.01.160 and Blazina and subsequent cases control. At sentencing, the prosecutor listed the "State's recommendation" for sentence, which included "$500 Crime Victim Penalty Assessment, $200 costs, $100 DNA fee, $500 that - excuse me, $1,500 DAC recoupment sine this did go to trial, restitution per later order of the Court[.]" RP 253-54. In imposing the sentence, the sentencing court simply adopted the fees the prosecution had mentioned, but amended only in part after asking if counsel was privately retained. RP 258. The following exchange occurred:

THE COURT:	So your client has qualified for counsel as an indigent?
[COUNSEL]:	Correct.
THE COURT:	Under those circumstances - - Mr. Hughes Simmons, just let me check. Do you have any funds or assets?
THE DEFENDANT:	No.
THE COURT:	Thank you. I'll waive the $1,500 Department of Assigned Counsel fee. We'll do restitution by later order of the court.

RP 258-59. A moment later, the same court found Mr. Hughes Simmons indigent for the purposes of exercising his constitutional right to appeal. RP 259.

This Court should reverse the orders imposing the legal financial obligations under Blazina and its progeny. In Blazina, our state's highest

court looked at RCW 10.01.160(3), the statute authorizing imposition of legal financial obligations. 182 Wn.2d at 835. That statute provides that the court "shall not order the defendant to pay costs unless the defendant is or will be able to pay them," and further that the court "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" before ordering a defendant to pay legal financial obligations (LFOs). Blazina, 182 Wn.2d at 836. The Court held that the statutory mandate prohibited a sentencing court from imposing an an order of such costs without first making a detailed examination of whether the defendant has the actual or likely ability pay. 182 Wn.2d at 835.

Further, making a finding of "ability to pay" requires more than just being able-bodied and thus not generally precluded from getting a job - as the lower court did here. Blazina, 182 Wn.2d at 835; see 7RP 78. Instead, the sentencing court must make a finding of actual ability to pay based on a detailed look at such things as the length of incarceration, existing financial obligations and whether the defendant qualified for a public defender and thus was indigent. Id.

The Blazina Court rejected the very same kind of pre-printed "boilerplate" finding of "ability to pay" used in this case. 182 Wn.2d at 836. Such findings do not meet the requirements, the Court held, because, "[p]ractically speaking, this imperative under RCW 10.01.160(3) means a court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. In addition to looking at existing financial debt and other factors, the Blazina Court also

noted that if someone met the requirements of proving they were indigent, "courts should seriously question that person's ability to pay[.]" Id.

The Court has recently reaffirmed Blazina and further held that the issue is not waived when not objected to below *and* that the reasoning of Blazina applies to not only discretionary LFOs but those mandated by statute. See State v. Duncan, 185 Wn. 2d 430, __ P.3d __ (No. 90188-1) (April 28, 2016); State v. Leonard, 184 Wn.2d 505, 358 P.3d 1167 (2015) (extending Blazina to apply to RCW 9.94A.760(2) and costs of incarceration).

Even more recently, our state's highest court struck down an order requiring an indigent defendant to pay $15 per month towards outstanding legal obligations in Wakefield, supra. In that case, the defendant had several convictions and challenged discretionary costs in a collateral attack, rather than direct appeal. Over the years, she had made intermittent payments and ultimately faced proceedings against her in a "fine review hearing," where she asked the trial court to "remit" her fines. The trial court first declared that "the caselaw doesn't say just because she's indigent or just because she has trouble meeting basic needs that she's excused from the penalty." Slip op. at 5. The judge then ordered, *inter alia*, a payment of $15 per month towards outstanding LFOs. Slip Op. at 1. The defendant had income of about $710 a month from public assistance.

On review, the Court noted the trial court's duty is to determine whether payment of the amount due will impose "manifest hardship" on the defendant or their immediate family. The lower court had failed in that duty by failing to recognize or apply the manifest hardship standard,

because it had simply imposed costs without examining whether paying them would cause such hardship on Wakefield and her family. Id.

The Court then held that it was "legal error" when the district court had disregarded the question of whether Wakefield could currently meet her own basic needs when evaluating ability to pay. It further reaffirmed Blazina and again instructed lower courts: "courts can and should use GR 34 as a guide for determining whether someone has an ability to pay costs."

Most significant to this case, the Court took the opportunity to repeat its very serious concerns about "the particularly punitive consequences of LFOs for indigent individuals" that it had discussed in Blazina. And it cautioned against setting low payment amounts as a panacea, again noting that, under our system, a person who pays $25 a month without fail every single month will *still* owe more towards the average LFOs 10 years later than the day the sentencing court imposed them. Wakefield, slip Op. at 11. The Court found it "unjustly punitive to impose payments that will only cause their LFO amount to increase," holding that such low payments should not be ordered except for "short-term situations." Slip Op. at 12.

Just like the defendants in Blazina, appellant is indigent. He qualified for a public defender at trial and in this appeal. He was given appointed counsel due to his lack of resources. There was no evidence presented at trial that he had any money or ability to pay costs. The only inquiry made by the sentencing court below was brief and off-the-cuff, not a thorough investigation of "ability to pay." And the sentencing court did not, in fact, make the required findings, instead just entering the judgment

and sentence with an improper "boilerplate" pre-printed "finding" of "ability to pay" condemned in Blazina. Reversal and remand for resentencing is required.

4. INTERPRETING SINCLAIR TO REQUIRE IMPOVERISHED APPELLANTS TO REBUT AN APPARENT PRESUMPTION OF IMPOSITION OF COSTS ON APPEAL S UNCONSTITUTIONAL UNDER FULLER AND BLANK

In general, the issue of costs on appeal is not ripe until the decision is issued, because the imposition of such costs depends on which party "substantially prevails." See RAP Title 14. In Sinclair, supra, Division One of the court of appeals adopted a new rule and procedure for addressing costs on appeal. This Court should not follow Division One on this issue, because Sinclair appears to create an effective presumption of imposition of such costs unless an indigent can *disprove* that they should be imposed because of his indigency. This in turn violates not only rulings of our highest court but also renders the procedure unconstitutional.

In Sinclair, supra, the prosecution filed a request for appellate costs after the decision on the merits. Sinclair, 192 Wn. App. at 385. The defendant objected, and the prosecution then urged Division One to impose costs on appeal against an unsuccessful appellant in *every* criminal case, claiming that the statutory opportunity for a defendant to later bring a request to remit costs was sufficient protection against imposition of costs against indigents. 192 Wn. App. at 388-89.

Division One disagreed, instead finding that the issue involves more than just a question of "ability to pay" but also whether discretion should be exercised to order costs on appeal in the first place. Sinclair, 192 Wn. App.

at 388-89. The Sinclair Court also disagreed with this Court's remedy of ordering costs on appeal in such situations conditioned upon a finding of remand by the trial court that the indigent defendant had "ability to pay" as defined in Blazina. Sinclair, 192 Wn. App. at 388-89. For Division One, entering such a conditional order amounted to delegation of the appellate court's duties. Id.

The Sinclair Court then crafted two new pleading requirements; 1) an appellant must set forth "[f]actors that may be relevant to an exercise of discretion" to impose appellate costs in case there is a future request for costs by the respondent and 2) the prosecution must make arguments regarding this issue in its "brief of respondent" in order to "preserve the opportunity to submit a cost bill" should it later decide one is warranted. 192 Wn. App. at. 390-91.

The Sinclair Court also ruled on the merits of the request in that particular case. 192 Wn.2d at 391-92. Division One recognized a presumption of indigence which applies throughout the appeal under RAP 15.2(f), unless it is rebutted by the state. Sinclair, 192 Wn. App. at 391-92. That Court then rejected the idea that imposition of costs on appeal was proper because of the defendant's prior solid work history and the lack of evidence that he might be "unable" to work in the future. Id. Instead, the Court pointed out that Mr. Sinclair had been found indigent both at trial and on appeal and there was "no reason to believe Sinclair is or ever will be able to pay $6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent)." Id. Because there was no trial court order that Sinclair's financial situation had improved or was

likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s if he did not die in prison, the Court exercised its discretion to deny the state's request for appellate costs. Id.

This Court has not yet indicated if it will follow the decision in Sinclair and change its existing procedures. But Sinclair should not - and cannot - be interpreted to create a presumption that costs on appeal will be imposed against an indigent appellant unless they meet a requirement of proving otherwise, because of the fundamental constitutional rights involved.

At the outset, this very question has been decided by our highest Court. In State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), the prosecution argued that costs should be awarded virtually as an "automatic" process in every criminal case, even if the defendant is indigent and the appeal not wholly frivolous. Nolan, 141 Wn.2d at 625-26. The Court rejected those claims. Even it a party establishes that they were the "substantially prevailing party" on review, the Court held, the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide in an exercise of its discretion whether to impose costs even when the party seeking costs is technically entitled to them. Nolan, 141 Wn.2d at 628.

There is a second problem with interpreting Sinclair to provide that an appellant's failure to preemptively object to imposition of costs on appeal will result in automatic imposition of such costs. In order to fully understand this issue, it is important to look at the rights involved. There is no federal constitutional right to appeal a criminal conviction. See McKane

v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894). Our state constitution, however, guarantees such a right. Blank, 131 Wn.2d at 244-46.

As a result, anyone convicted of a crime in our state courts has a constitutional right to a full, fair and meaningful appeal - and further, to appointed counsel at public expense if the person is indigent. See State v. Giles, 148 Wn.2d 449, 450-51, 60 P.3d 1208 (2003); Blank, 131 Wn.2d 244.

The state constitutional right to appeal is not, however, the only right involved. Where, as here, a state creates a right, federal due process and equal protection mandates apply and preclude the state from burdening the right in particular ways. See Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). As a result, when there is a state-created constitutional right to appeal, that appeal must be more than a "meaningless ritual" and must comport with basic notions of fairness. See Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). The due process clause of the Fourteenth Amendment guarantees a criminal appellant who is pursuing her first appeal of "right" in a state court certain minimum safeguards to make the appeal "adequate and effective," including the right to counsel. Id. Further, even though no federal right to *appeal* is involved, federal due process and equal protection mandates apply to the procedures used in deciding a first appeal as right. See Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

Thus, state constitutional rulings are not the only arbiter of the constitutionality of a state practice in an appeal brought as a matter of state

constitutional right.

This intertwining of federal and state constitutional principles is at issue here, where an impoverished person chooses to exercise a state constitutional right and is required to pay to do so. In general, it is unconstitutional to require payment for the exercise of a constitutional right. See Fuller, supra. In Fuller, however, the U.S. Supreme Court upheld a statute requiring an indigent defendant who received appointed counsel on appeal due to poverty to later repay that cost if he had become able. 417 U.S. at 45.

In reaching its conclusion, the Fuller Court relied on several crucial features of the statute in question. First, the statute did not make repayment mandatory. 417 U.S. at 45. Second, it required the appellate court to "take into account the defendant's financial resources and the burden that payment would impose." See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller). Third, the statute provided that no payment obligation could be imposed "if there was no likelihood the defendant's indigency would end." Fuller, 417 U.S. at 46. Fourth, under the statute, no convicted person could be held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

Based upon these careful proscriptions on how the repayment obligation was imposed and enforced, the Fuller Court was convinced the relevant statute did not penalize those who exercised their rights but simply "provided that a convicted person who later becomes able to pay . . .may be required to do so." 417 U.S. at 53-54. Because the legislation was "tailored to impose an obligation only upon those with a foreseeable ability

to meet it, and to enforce that obligation only against those who actually become able to to meet it without hardship," the statute was constitutional. 417 U.S. at 53-54.

In Blank, supra, our Supreme Court examined Fuller and upheld our state's own "recoupment" statute for appeals, RCW 10.73.160. That statute provides, in relevant part:

> (1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.
>
> (2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.
>
> (3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence.
>
> (4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

Blank, 131 Wn.2d at 245; quoting, RCW 10.73.160.

In upholding the constitutionality of the statute, the Blank Court was convinced that the remission procedure in subsection (4) of the statute

would operate to ensure that the statute was consistent with the mandates of Fuller. Blank, 131 Wn.2d at 246. Indeed, the Blank Court was confident that trial courts would be following the analysis and requirements of Fuller in deciding issues regarding enforcement and collection of costs on appeal. Blank, 131 Wn.2d at 246.

Blank was decided in 1997. But last year, in Blazina, the Supreme Court issued its decision which cast serious doubt on the continuing validity of Blank - and whether the recoupment statute can still be deemed "constitutional." By statute, an award of costs on appeal becomes part of the judgment and sentence, so that it may be collected against by the state just as trial LFOs. RCW 10.73.160(3). The same 12 percent interest that the Supreme Court found untenable in Blazina, the same ever-deepening hole of collection, the same problems of enforcement against an indigent, the same difficulty of the defendant to get a job with a criminal history once released let alone sufficient money to pay off the costs of appeal while in custody - in short, all but the concerns about the racial disparity in imposition of costs are clearly present in both situations.

In addition, there is a very significant difference between costs on appeal and trial costs not discussed in Sinclair. Costs imposed at trial are part of the sentence, intended to serve those punitive purposes, but the ostensible purpose of appellate "recoupment" statutes such as RCW 10.73.160(3) is "not punishment but simply a fiscal interest in recovering money expended and in discouraging fraudulent assertions of indigency." Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for their Court-Appointed Counsel Through Recoupment and Contribution,*

42 U. MICH. J. OF L. REFORM 323, 339 (2009).

We now know, because of Blazina, that the protections the Court relied on in Blank do not exist and people are, in fact, spending time in jail for nonpayment of legal financial obligations they are unable to pay because of poverty. Because appellate costs are included as part of those LFOs because they are added to the judgment and sentence, the impacts noted in Blazina will fall equally on appellants. Under Fuller, no payment obligation can be imposed "if there was no likelihood the defendant's indigency would end." Fuller, 417 U.S. at 46. Further, under Fuller, this Court cannot impose costs on appeal unless it considered the appellant's actual ability to pay, not simply based on a presumption that costs *will* be imposed unless the defendant provides sufficient evidence that they should not or meets some briefing requirement on that point. This Court should decline to follow Sinclair and should further decline to impose costs on appeal in this case.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial. In the alternative, it should strike the condition of forfeiture and order resentencing based on the LFO error. Further, it should decline to impose costs on appeal.

DATED this 15th day of November, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel via this Court's upload service at pcpatcecf@co.pierce.wa.us, and to Mr. Hughes Simmons, Jr., at DOC 340203, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 15th day of November, 2016

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